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No. 79-1738

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

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Morton, Ina, David, Mark, and Gary Halperin — the respondents in *Kissinger* v. *Halperin,* No. 79-880 — respectfully move the Court for leave to intervene in the instant case. As set forth below, the Halperins have a vital interest in the disposition of this case that is not being adequately represented by either petitioner or respondent.

BACKGROUND

At the direction of then President Nixon, federal agents maintained a warrantless wiretap on the Halperins' home telephone for twenty-one months. After learning of this

surveillance, the Halperins filed suit seeking damages from Nixon and other responsible officials under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520, and under the Fourth Amendment.[1]

Following a decision in the United States Court of Appeals for the District of Columbia Circuit which remanded the case for further proceedings on terms that were favorable to the Halperins in all respects, *Halperin* v. *Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), this Court on May 19, 1980, granted certiorari to consider whether the President is absolutely immune from suits for damages arising from violations of citizens' constitutional rights and, if so, whether the President's closest advisers enjoy a derivative absolute immunity. *Kissinger* v. *Halperin,* No. 79-880.[2] On June 22, 1981, by an equally divided vote, Justice Rehnquist not participating, the Court affirmed the decision of the court of appeals with respect to Nixon, Kissinger, and Mitchell and dismissed as improvidently granted the writ of certiorari with respect to Haldeman. On the same day, the Court, without any recusals indicated, granted Mr. Nixon's petition for certiorari in the instant case, as well as the separate petition for certiorari filed by his two co-defendants. *Harlow* v. *Fitzgerald,* No. 80-945.

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[1]The Halperins also seek damages from Henry Kissinger, John Mitchell, and H. R. Haldeman.

[2]Review in *Kissinger* was also granted on the questions of whether petitioners are entitled to qualified immunity on the ground that the law regarding electronic surveillance was unsettled at the time of the Halperin wiretap and whether the decision below unfairly imposes retroactive liability. However, the Solicitor General expressly limited the petition in *Kissinger* v. *Halperin* to the issue of immunity from constitutional claims and did not raise any issue with respect to the Halperins' statutory claims. (Pet. 10 n.8; Pet. Br. 10 n.16.)

On July 16, 1981, the Acting Solicitor General filed a petition for rehearing in *Kissinger* v. *Halperin* in which he suggested that the Court hold that case pending decision in *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald* and then dispose of it in light of that decision. Thus, the *Halperin* case has become closely linked with the *Fitzgerald* case.

Furthermore, because of a secret agreement between Nixon and Fitzgerald, it is apparent that Nixon's primary interest in the instant case is gaining a second chance at defeating the Halperins. This agreement was entered into in the spring of 1980 when, despite the pendency of the petition for certiorari in *Kissinger* v. *Halperin,* the district court declined to postpone the trial in Fitzgerald's case which was scheduled to begin on June 4, 1980. (Pet. 15.) In order to avoid a trial on Fitzgerald's claims, Nixon agreed to pay Fitzgerald $144,000 immediately and to pay him an additional $34,000 if Nixon's appellate efforts to dismiss the case are ultimately unsuccessful. In exchange for those payments, Fitzgerald agreed that the case would never go to trial. After this Court granted review in *Kissinger,* the district court stayed the *Fitzgerald* trial pending a decision in *Kissinger,* and the grant of review in this case has further postponed any trial. Nonetheless, the impact of this agreement is clear: if Nixon wins in this Court, his case against Fitzgerald is over, but Fitzgerald keeps his $144,000. If Nixon loses, he will have to pay an additional $34,000, but he will never have to face a public trial on Fitzgerald's claim in either event. Because of the relation of this case to *Kissinger* v. *Halperin,* the Halperins seek leave to intervene and suggest other actions which they believe this Court ought to take at this time.

ARGUMENT

I

The Court in the past has permitted parties who did not participate in the proceedings below to intervene in pending cases in order to protect their interests. *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966) (order granting intervention), 385 U.S. 432 (1967) (decision on the merits); *United States* v. *Terminal Railroad Ass'n*, 236 U.S. 194, 199 (1915). In *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 176-178 (1948), although denying intervention, the Court relied on the standard of Rule 24(a)(2), Fed. R. Civ. P., which at that time provided that a party would be permitted to intervene in a district court "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Because the Halperins plainly meet these criteria, they should be permitted to intervene.

The Solicitor General's petition for rehearing in *Kissinger v. Halperin* demonstrates that the Halperins' interests are vitally affected by the outcome in this case. Indeed, even if the Court denies the petition for rehearing, a decision upholding absolute immunity in *Nixon* v. *Fitzgerald* might seriously impair the Halperins' suit in the lower courts. Furthermore, Nixon's $144,000 payment to Fitzgerald, the $34,000 limitation on Nixon's further liability to Fitzgerald, and the agreement that Fitzgerald can never take Nixon to trial demonstrate that Nixon's principal interest here is a second try at defeating the Halperins. Thus, the Halperins should be permitted to participate in this case, since their interest in its outcome is at least as great as the fixed sum which Fitzgerald has at stake.

Moreover, Fitzgerald will not adequately represent the Halperins' interests because of significant differences between the two cases. If permitted to intervene, the Halperins will argue, for reasons that are adverse to Fitzgerald's interests, that this case can be disposed of without reaching the question of whether Nixon is absolutely immune from damage suits for all constitutional torts. The Halperins, and they alone, will argue that the case should be remanded to the court of appeals to consider (1) whether Nixon is entitled to absolute immunity from Fitzgerald's claims, which are readily distinguishable from the Halperins' claims, and (2) whether Fitzgerald's claims against Nixon should be dismissed without reaching the issue of absolute immunity. These are arguments which neither petitioner nor respondent will raise in this Court, because Nixon seeks a ruling on presidential immunity that will protect him from the Halperins' claims, and Fitzgerald cannot be expected to present the flaws in his own case.

At the outset, it is important to note that Nixon's appeal from the district court's denial of his motion for summary judgment on absolute immunity grounds was dismissed by two judges of the court of appeals for lack of jurisdiction. (Pet. App. 36a.) This dismissal was contrary to the rule in the District of Columbia Circuit that such orders are appealable under 28 U.S.C. § 1291. *Dellums* v. *Powell,* No. 80-1331, Slip Op. at 4 (D.C. Cir., July 24, 1981); *Briggs* v. *Goodwin,* 569 F.2d 10, 58-60 (D.C. Cir. 1977) (Wilkey, J., writing separately for the court on appealability), *cert. denied,* 437 U.S. 904 (1978); *McSurely* v. *McClellan,* 521 F.2d 1024, 1030-1032 (D.C. Cir. 1975), *aff'd in pertinent part en banc,* 553 F.2d 1277, 1283-1284 n.18 (1977), *cert. dismissed,* 438 U.S. 189 (1978). *See Helstoski* v. *Meanor,* 442 U.S. 500 (1979); *Abney* v. *United States,* 431 U.S. 651

(1977). Thus, the Halperins agree with Nixon that the court of appeals erred in refusing to hear Nixon's appeal. However, contrary to Nixon's submission (Pet. 13-14 n.2), the Halperins urge that the court of appeals be given an opportunity to rule on the merits of the *Fitzgerald* case prior to this Court's review.[3]

Contrary to Nixon's contention (Pet. 13-14 n.2), the outcome of the court of appeals' review in this case would not necessarily be dictated by that court's decision in *Halperin* v. *Kissinger*. Fitzgerald's claims against Nixon are quite different from the Halperins' claims against Nixon, and the court of appeals might find that absolute immunity is appropriate in *Fitzgerald*. Fitzgerald asserts that he was fired from his job in the Department of Defense because he gave testimony to a congressional committee in which he predicted massive cost overruns in the development of an aircraft. He seeks to convert the common law torts of interference with economic advantage and infliction of emotional distress into constitutional claims by alleging that Nixon violated his First Amendment rights by firing him in retaliation for his testimony. *Fitzgerald* v. *Seamans*, 553 F.2d 220, 223-226 (D.C. Cir. 1977).[4] This is a far cry from the Halperin's case where Nixon directed his subordinates to take action which itself directly violated the Fourth Amendment. The Halperins' case presents as stark a violation of constitutional rights as did the forcible, warrantless entry in *Bivens* v. *Six Unknown Named*

[3]The recent decision of the Court of Appeals for the District of Columbia in *Dellums* v. *Powell* demonstrates that the dismissal of Nixon's appeal was an intra-circuit aberration rather than a conflict between the circuits worthy of this Court's review as Nixon mistakenly contends. (Pet. 14 n.3.)

[4]This case provides a fuller statement of Fitzgerald's claims than do the petition for certiorari and brief in opposition now before the Court.

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Fitzgerald's case, however, presents a far more attenuated constitutional claim and one for which absolute rather than qualified immunity might be appropriate.

Furthermore, the court of appeals might find that Fitzgerald's case should be dismissed without reaching the immunity issue. It is the rule in the District of Columbia Circuit, as elsewhere, that when an appellate court has before it a proper appeal from a collateral order denying absolute immunity, it may also review other issues on which the district court has ruled. *Dellums* v. *Powell, supra*, Slip Op. at 5 n.6. Thus, the court of appeals could have considered whether Fitzgerald has stated a claim for damages arising from a violation of his constitutional rights. In fact, there are two grounds on which the court of appeals might decide that Fitzgerald has not stated such a claim.

First, the court might follow the decision in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), which held that civil service employees, such as Fitzgerald, who are fired in alleged retaliation for the exercise of their First Amendment rights, have no cause of action under the First Amendment in view of (1) the special relationship between the federal government and its employees, and (2) the alternative remedies which are available to them under the civil service system. The Fifth Circuit in *Bush* found that these were special factors which counsel against recognizing a constitutional cause of action when a federal employee is fired under such circumstances. *See Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, 403 U.S. at 396. Such an argument might be particularly persuasive in Fitzgerald's case since he has obtained back-pay

and reinstatement under the scheme which Congress has enacted to protect federal employees. (Pet. 6.)

Second, the court of appeals might conclude that the speech for which Fitzgerald was allegedly fired is not protected by the First Amendment and that therefore he does not have a constitutional claim. If Fitzgerald has not stated a claim that his constitutional rights have been violated, then the defendants plainly enjoy absolute immunity from what is a common law tort. *Butz* v. *Economou,* 438 U.S. 478 (1978); *Barr* v. *Matteo,* 360 U.S. 564 (1959). In *Pickering* v. *Board of Education,* 391 U.S. 563, 570 n.3 (1968), this Court recognized that even truthful public criticism by a subordinate of his superiors might be grounds for dismissal where the need for confidentiality is great or where public criticism would seriously undermine the working relationship between them. Indeed, a number of lower courts have relied on *Pickering* to hold that criticism by public employees of their superiors is not protected by the First Amendment. *See* cases collected in Justice Rehnquist's dissent from the denial of certiorari in *Saye* v. *Williams,* No. 80-1123 (June 8, 1981). Thus, there is a substantial question whether the speech on which Fitzgerald bases his complaint is protected under the First Amendment.

These issues, which only the Halperins will raise, demonstrate that they should be granted leave to intervene. Moreover, these unresolved issues dictate a remand to the court of appeals for consideration there in the first instance without further review in this Court. However, they also are grounds on which this Court might wish to decide this case. In that event, the Court should request further briefing on these additional questions and permit the Halperins to intervene for that purpose.

II

A number of the facts supporting intervention also demonstrate that this case is an inappropriate occasion for the Court to decide whether the President enjoys absolute immunity from civil liability for actions which violate the constitutional rights of citizens. Accordingly, the Halperins urge the Court to dismiss the writ as improvidently granted.

The issue in the *Fitzgerald* case is not whether Nixon is absolutely immune, for he has already paid Fitzgerald $144,000. Instead, the issue is whether Nixon can limit his liability to that amount and avoid paying Fitzgerald a relatively modest additional sum of money. Although Nixon asserted that the burden of enduring a trial in *Fitzgerald* was an important reason for granting his petition for certiorari (Pet. 15), he bought his way out of that trial while the petition was pending. Nixon's petition in the *Fitzgerald* case represents little more than a $34,000 wager on how this Court will rule on an issue which Nixon has largely conceded to Fitzgerald by paying him $144,000.

Furthermore, on June 18, 1980, before review was granted, counsel for Nixon and Fitzgerald filed a Joint Statement of the Parties in which they denied press reports that the case had been settled and affirmatively stated: "The parties have agreed at this stage to fix the amount of payments to which respondent *would be* entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court." (Emphasis added.) By indicating that any payment would be prospective, and hence dependent on future action by this Court and the district court, counsel may have misled the Court by not revealing the fact that Nixon had already paid Fitzgerald

$144,000 and that this payment will be unaffected by any subsequent judicial action. This may provide yet another reason for dismissing the writ.

An additional reason for dismissing the writ as improvidently granted is that Nixon's effort to win the *Halperin* case through the *Fitzgerald* case apparently presents Justice Rehnquist with the same cause for recusal which constrained him from participating in *Kissinger* v. *Halperin.* As we have demonstrated, the Halperins, not Fitzgerald, are Nixon's real target in this case. Moreover, the Solicitor General's petition for rehearing firmly links the two cases. If we are correct that the identity of interests in the two cases will require Justice Rehnquist to recuse himself from *Nixon* v. *Fitzgerald,* then it will be an improvident allocation of the Court's resources to address once again the issue of presidential immunity with the possibility of another four-four deadlock.

CONCLUSION

The Halperins believe that the most appropriate disposition of *Nixon* v. *Fitzgerald* would be for the Court to dismiss the writ as improvidently granted for the reasons relating to the Nixon-Fitzgerald agreement and the linkage of the *Halperin* and *Fitzgerald* cases. However, if the Court proceeds with plenary consideration of this case, the Halperins should be allowed to intervene in order to raise the issues discussed in Point I, primarily as grounds for remanding the case to the court of appeals or alternatively as grounds for this Court's decision on the merits. Finally, the Halperins respectfully suggest that the linkage of this case with their's may require Justice Rehnquist to recuse himself for the same reasons that he declined to participate in *Kissinger* v. *Halperin*.

Respectfully Submitted,

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